No. 85-574

Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, LOUIS ARADO, HUGH HERATY, GARVIN NIX, JOSEPH LORENZ, MICHAEL GRIEGEL, WILLIAM McCORRY, DENNIS JYRKOWSKI, JOSEPH MUCIA, ROBERT MURRAY, JAMES ORR, RICHARD KIMBLE, JOHN KACHKA, ALEX McCRAE, FRANK SADLER, THOMAS MINASOLA, GEORGE HEAD, LEONARD MIJKA, JOHN VOLLAND, RONALD JABLON, RICHARD RICCIO, ARTHUR BISCHOFF, JAMES GEOGHEGAN, JOHN DUFFY, DANIEL McCRORY, WILLIAM DEVONEY, ROY WALKER, ALBERT POHL, ROBERT KEATING, RUSSELL ALONGI, KENNETH BRINGE, JOHN CULLOTON, JOHN TOLLEY, JOHN J. MURPHY, HUGH O'MALLEY, CARL NEUMULLER, JAMES BEGLEY, JAMES MORGAN, WILLIAM O'BRIEN, RAYMOND GREENWOOD, THOMAS CRONIN, THOMAS BRADY, TERRENCE McCUE, ROBERT TILL, FRANKLIN CRAWFORD, RAYMOND GIEHOOB, DANIEL MORAN, PATRICK LOGAN, TERRENCE FORBES, RALPH MORETH, JAMES P. BROWN, PAUL C. CEFFALIO and CHARLES R. LOFTUS, individually and on behalf of all others similarly situated,

Petitioners,

v.

CITY OF CHICAGO, CHICAGO POLICE DEPARTMENT, RICHARD J. BRZECZEK and CHARLES H. POUNIAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

BEST AVAILABLE COPY

JAMES D. MONTGOMERY,*
Corporation Counsel of the
City of Chicago,
610 City Hall,
Chicago, Illinois 60602,
(312) 744-7764,
Attorney for Respondents.

MARY K. ROCHFORD,
Chief Assistant Corporation Counsel,
Of Counsel.

* Counsel of Record.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

16 pp

QUESTION PRESENTED

Whether petitioners, sergeants in the Chicago police force, have a property or liberty interest in particular promotional procedures and in promotion to lieutenant.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
REASONS FOR NOT GRANTING THE WRIT OF *CERTIORARI*:	
1.	
Petitioners Do Not Possess A Constitutional Property Interest In Promotion To Police Lieutenant Or In Promotional Procedures Which Are Rationally Related To The Job Of Police Lieutenant	3
2.	
Petitioners Do Not Have A Liberty Interest In Promotion To Police Lieutenant, And The Court Of Appeals Was Correct In Overruling *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982), Which Held Otherwise	7
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	PAGE
Bara v. Aurora Civ. Serv. Com'n. of City of Aurora, 580 F. Supp. 212 (N.D. Ill. 1983), *aff'd*, No. 85-1050 (slip opinion) (7th Cir. July 1, 1985), *cert. denied*, No. 85-575 (November 18, 1985) .	6, 10
Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981)	4, 6, 7, 10
Bigby v. City of Chicago, 766 F.2d 1053 (7th Cir. 1985)	1, 2, 7, 10
Bishop v. Wood, 426 U.S. 341 (1976)	4, 8
Board of Regents v. Roth, 408 U.S. 564 (1972)	3, 4, 8, 9, 10
Brunke v. Bd. of Fire & Police Comm'rs, 99 Ill. App. 3d 25 (1st Dist. 1981)	4, 5
Burns v. Sheriff's Dept. Merit Com'n, 86 Ill. App. 3d 226 (4th Dist. 1980)	5
Burns v. Sullivan, 619 F.2d 99 (1st Cir. 1980), *cert. denied*, 449 U.S. 893 (1980)	6
Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886 (1961) .	8, 9
Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979)	6
DiIulio v. Board of Fire & Police Comm'rs, 682 F.2d 666 (7th Cir. 1982)	2, 7, 8, 10
Doyle v. University of Alabama in Birmingham, 680 F.2d 1323 (11th Cir. 1982)	6
Goodisman v. Lytle, 724 F.2d 818 (9th Cir. 1984) .	6

Hauri v. Batzel, 71 Ill. App. 3d 164 (2nd Dist. 1979) 5

Lawson v. Sheriff of Tippecanoe County, Inc., 725 F.2d 1136 (7th Cir. 1984) 10

Lenert v. Wilson, 56 Ill. App. 2d 325 (1st Dist. 1965) 4, 5, 6

McCoy v. Bd. of Fire & Police Comm'rs, 79 Ill. App. 3d 742 (1st Dist. 1979) 4, 5

Myer v. Nebraska, 262 U.S. 390 (1923) 8

Paul v. Davis, 424 U.S. 693 (1976) 8, 9

Perry v. Sindermann, 408 U.S. 593 (1972) 3, 4

Robb v. City of Philadelphia, 733 F.2d 286 (3rd Cir. 1984) 6, 10

Snowden v. Hughes, 321 U.S. 1 (1944) 5

Sullivan v. Bd. of Fire & Police Comm'rs, 103 Ill. App. 3d 167 (2nd Dist. 1981) 5

Webster v. Redmond, 599 F.2d 793 (7th Cir. 1979), *cert. denied*, 444 U.S. 1039 (1979) 6, 8, 9

Zuelke v. Bd. of Fire & Police Comm'rs, 79 Ill. App. 3d 1080 (1st Dist. 1979) 4, 5

Statute

Ill. Rev. Stat., ch. 24, §10-1-13 ..... 4, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAURICE THOELE, et al.,

Petitioners,

vs.

CITY OF CHICAGO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, the City of Chicago, Chicago Police Department, Richard J. Brzeczek and Charles Pounian, by their attorney JAMES D. MONTGOMERY, Corporation Counsel of the City of Chicago, respectfully request that this Court deny the petition for writ of *certiorari*, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 766 F.2d 1053.

STATEMENT OF FACTS

A group of black police sergeants brought suit pursuant to Title VII against the City of Chicago, the Chicago Police Department and its Superintendent, and the Direc-

tor of the Chicago Department of Personnel. The plaintiffs had sought promotion to lieutenant. The suit charged that the City's promotional procedures were discriminatory, and, thus, plaintiffs were prevented from being promoted. The petitioners, a group of white and Hispanic police sergeants, intervened in the suit. The petitioners also had sought promotion to lieutenant and maintained that the promotional procedures violated their rights under the Due Process Clause of the Fourteenth Amendment. The district court found the promotional procedures contravened the provisions of Title VII but held "that it does not follow that it [the promotional scheme] was arbitrary and capricious so as to entitle the intervenors . . . to recover under the Due Process Clause of the Fourteenth Amendment" (C. 140, p. 20). The district court dismissed the intervenors' suit. The intervenors appealed.

The United States Court of Appeals for the Seventh Circuit upheld the order dismissing the intervenors' suit, holding that "a constitutional right, unrelated to racial or other discrimination, to a rational test for promotion to a higher rung in the civil service of a state or municipality" does not exist. *Bigby v. City of Chicago*, 766 F.2d 1053, 1056 (7th Cir. 1985). In so holding, the court of appeals expressly overruled its decision in *DiIulio v. Board of Fire & Police Comm'rs*, 682 F.2d 666 (7th Cir. 1982). In *DiIulio*, the court of appeals found that policemen in Illinois possessed a liberty interest in a promotional scheme that has a rational relationship to the job being sought. Petitioners contend that the court of appeals erred in affirming the order dismissing their claims and argue that: (1) the decision in *DiIulio* should not have been overturned; and (2) that petitioners have a property and a liberty interest in promotional procedures which have a rational relation to the job of police lieutenant.

REASONS FOR NOT GRANTING THE WRIT OF *CERTIORARI*

1.

Petitioners Do Not Possess A Constitutional Property Interest In Promotion To Police Lieutenant Or In Promotional Procedures Which Are Rationally Related To The Job Of Police Lieutenant.

The petitioners claim a property interest, which is subject to constitutional protection, in promotional procedures which are rationally related to the job of police lieutenant. The court of appeals stated that what petitioners truly seek is promotion to lieutenant. The petitioners possess neither a property interest in a particular promotional scheme nor in promotion to lieutenant.

The Fourteenth Amendment's procedural protections safeguard property, or "the security of interests a person has already acquired in specific benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972). A benefit, if it is to gain the status of a constitutionally protected property right, must have certain attributes. "To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. State law creates and defines the dimensions of property interests. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Therefore, petitioners must have an entitlement to and not merely an abstract need for the type of promotional scheme they desire and for promotion to lieutenant.

Whether petitioners have a "legitimate claim of entitlement" to a promotion or to the promotional procedure they demand must be ascertained with reference to the

law of Illinois. The "touchstone" for such a determination has been described as follows:

> . . . the more circumscribed is the government's discretion . . . to withhold a benefit, the more likely that benefit constitutes "property" (cites omitted), for the more reasonable is reliance upon its continued availability and the more likely it is that a hearing will illuminate the appropriateness of withholding it in an individual case.

Beitzeill v. Jeffrey, 643 F.2d 870, 874 (1st Cir. 1981), *citing Roth, supra*; *Perry, supra*; and *Bishop v. Wood*, 426 U.S. 341 (1976).

Article 10, Division 1 of the Illinois Municipal Code, Ill. Rev. Stat., ch. 24, §10-1-1, *et seq.*, governs the terms and conditions of municipal public employment. Section 10-1-13 of the Illinois Municipal Code, Ill. Rev. Stat., ch. 24, §10-1-13, governs promotions in the Chicago Police Department and provides in pertinent part:

> The [civil service] commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination . . . . All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination.

The Illinois courts, considering this section and those sections of the Illinois Municipal Code governing the police forces of smaller municipalities, consistently have held that the manner of promotion is within the discretion of the government. *See, e.g., Lenert v. Wilson*, 56 Ill. App. 2d 325 (1st Dist. 1965); *McCoy v. Bd. of Fire & Police Comm'rs*, 79 Ill. App. 3d 742 (1st Dist. 1979); *Zuelke v. Bd. of Fire & Police Comm'rs*, 79 Ill. App. 3d 1080 (1st Dist. 1979); *Brunke v. Bd. of Fire & Police Comm'rs*, 99

Ill. App. 3d 25 (1st Dist. 1981). The courts also have held that the provision does not establish a vested right in promotion. *Lenert, supra*; *McCoy, supra*; *Sullivan v. Bd. of Fire & Police Comm'rs*, 103 Ill. App. 3d 167 (2nd Dist. 1981). The courts have rejected claims by applicants that particular types of promotional procedures are required. *See, e.g., Sullivan, supra* (where court noted that there was no authority for the proposition that a property interest exists in examinations of a particular character); *Burns v. Sheriff's Dept. Merit Com'n*, 86 Ill. App. 3d 226 (4th Dist. 1980) (where court held that "numerical scoring is not a necessary prerequisite for evaluating the fairness of a promotion process"); *Hauri v. Batzel*, 71 Ill. App. 3d 164 (2nd Dist. 1979) (where court rejected plaintiff's attempts to eliminate personal evaluations from police promotional scheme); *Zuelke, supra* (where court held that precise guidelines for assessing candidates efficiency and merit were not necessary).

Promotions to lieutenant are not governed by fixed standards which if met automatically entitle the petitioners to promotion. Under Illinois law, the petitioners do not have a vested property right in a particular type of promotional procedure or in promotion to police lieutenant, but "merely [have] standing to assert in an appropriate case" that the government has not followed the Illinois promotion statute. *Sullivan, supra*, 103 Ill. App. 3d at 172. Alleged violations of local statutes do not infringe the United States Constitution. *Snowden v. Hughes*, 321 U.S. 1 (1944).

The petitioners argue that the "ascertained merit" language of the promotion statute creates a property interest in promotion examinations that are rationally related to the job being sought. As shown, Illinois law bestows no

property rights in promotion or in specifically desired promotional procedures. Furthermore, the petitioner's argument defies the plain language of Section 10-1-13. This provision provides that promotions be based on three separate elements: "ascertained merit *and* seniority in service *and* examination." Ill. Rev. Stat., ch. 24, §10-1-13. These elements are "distinct". *Lenert, supra,* 56 Ill. App. 2d at 330. The only statutory language which defines the "examination" element is that language which provides that the examination should be "competitive".

Federal courts as well have determined that a property interest does not exist in government promotions. *Bara v. Aurora Civ. Serv. Com'n. of City of Aurora,* 580 F. Supp. 212 (N.D. Ill. 1983), *aff'd,* No. 85-1050 (slip opinion) (7th Cir. July 1, 1985), *cert. denied,* No. 85-575 (November 18, 1985) (where United States Court of Appeals for the Seventh circuit held that there exists no constitutionally protected interest in promotion and cited its opinion in this case); *Webster v. Redmond,* 599 F.2d 793 (7th Cir. 1979), *cert. denied,* 444 U.S. 1039 (1979); *Beitzell v. Jeffrey,* 643 F.2d 870 (1st Cir. 1981); *Burns v. Sullivan,* 619 F.2d 99 (1st Cir. 1980), *cert. denied,* 449 U.S. 893 (1980); *Robb v. City of Philadelphia,* 733 F.2d 286 (3rd Cir. 1984); *Clark v. Whiting,* 607 F.2d 634 (4th Cir. 1979); *Goodisman v. Lytle,* 724 F.2d 818 (9th Cir. 1984). *See, also, Doyle v. University of Alabama in Birmingham,* 680 F.2d 1323 (11th Cir. 1982) (where court held there was no property interest in a salary raise). A property interest was found not to exist even where the government had established criteria for promotion and where the promotion was to be made on the basis of merit or competitive examination. *Beitzell, supra; Goodisman, supra; Clark, supra; Webster, supra; Burns, supra.* In so holding,

the courts recognized that the promotion determination entails "subjective judgment, confidential deliberation, and personal knowledge" of the candidate. *Beitzell, supra,* 643 F.2d at 875.

The position of police lieutenant is one of considerable importance and public significance and involves a high degree of sensitivity and responsibility. The courts, therefore, afford the government great latitude of discretion in the selection and promotion to lieutenant. Petitioners, as candidates for promotion, do not have automatic rights or entitlements to promotion and possess no property interest in a particular promotional procedure. The court of appeals did not err by holding that Illinois law may create "an expectation that the examinations used for promotions in the civil service will be fair but . . . not so firm and definite an expectation as to be 'property' in a constitutional sense." *Bigby, supra,* 766 F.2d at 1056.

2.

Petitioners Do Not Have A Liberty Interest In Promotion To Police Lieutenant, And The Court Of Appeals Was Correct In Overruling *DiIulio v. Board of Fire & Police Comm'rs,* 682 F.2d 666 (7th Cir. 1982), Which Held Otherwise.

The petitioners claim a liberty interest "in a meaningful opportunity to advance" within the Police Department (Petition for Writ of Certiorari, p. 23). The Constitution does not recognize such a liberty interest. The court of appeals, in finding petitioners had no liberty interest in this case, reversed its prior decision in *DiIulio v. Board of Fire and Police Comm'rs,* 682 F.2d 666 (7th Cir. 1982). *DiIulio* had held that in Illinois, policemen possessed a liberty interest in a promotional scheme that has a rational relationship to the job being sought. This holding was con-

trary to established law and directly conflicted with a prior decision of the court of appeals in *Webster v. Redmond*, 599 F.2d 793 (7th Cir. 1979). It is respectfully submitted that the decision of the court of appeals reversing *DiIulio* and finding that no liberty interest exists in a promotion does not warrant further review or the exercise of this Court's supervisory power.

Not every government action affecting employment implicates a liberty interest. *Board of Regents v. Roth*, 408 U.S. 564 (1972). For,

> [t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made directly by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs (footnote omitted).

Bishop v. Wood, 426 U.S. 341, 349-350 (1976).

In order to state a claim for deprivation of a liberty interest without due process in a public employment case, it is necessary to allege that the public employer published, *Bishop v. Wood*, 426 U.S. 341, 348 (1975), stigmatizing information, *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), about the employee that resulted in the deprivation of a recognized liberty interest without due process of law, *Paul v. Davis*, 424 U.S. 693, 701 (1976). "[T]o determine whether due process requirements apply in the first place, we must look . . . to the *nature* of the interest at stake." *Roth, supra*, 408 U.S. at 570-571 (emphasis in original). The liberty interests protected by due process include the right "to engage in any of the common occupations of life." *Myer v. Nebraska*, 262 U.S. 390, 399 (1923).

The liberty interest to pursue a chosen trade must be distinguished from an employee's wishes for a certain job. *Cafeteria and Restaurant Workers Union, Local 473*

AFL-CIO v. McElroy, 367 U.S. 886 (1961). A government employee might have a liberty interest where the government imposes "a stigma or other disability that foreclose[s] [the] freedom to take advantage of other employment opportunities." *Roth, supra*, 408 U.S. at 573. A deprivation of liberty may not occur even with the loss of a job, as long as one may obtain alternative employment. *Paul v. Davis*, 424 U.S. 693 (1976); *Roth, supra*.

The respondents' promotional procedures *may* have prevented petitioners from being promoted to lieutenant. The procedures, however, certainly did not prevent petitioners from engaging in the occupation of policeman. The petitioners are still in the employ of the city's police department and have not been discharged. The petitioners are free to remain in the position of sergeant, pursue police work, and are not foreclosed from seeking promotion to lieutenant in the future. The respondents, in declining to promote the petitioners, made no charges and gave no reasons. Only the fact of nonpromotion and the eligibility list in rank order of the candidates were made public.

The petitioners' liberty interests were not violated. The fact of nonpromotion at the most may affect the petitioners' employment desirability in the future, but does not foreclose in any way other employment opportunities or the continuation of petitioners' police careers. As the court of appeals held in *Webster, supra*, 500 F.2d at 798,

> [t]he mere fact of nonpromotion does not implicate a protectible liberty interest, *see Roth, supra*, and because neither the Board nor any of its members published reasons for the decision it cannot be said that the Board made "[a] charge against him that might seriously damage his standing and associations in his community." *Id.* 408 U.S. at 573, 92 S.Ct. at 2707 (footnote omitted).

Other federal courts have dismissed claims of a violation of a liberty interest based only on the failure to promote. *Robb v. City of Philadelphia*, 733 F.2d 286 (3rd Cir. 1984); *Bara v. Aurora Civ. Serv. Com'n of City of Aurora*, 580 F. Supp. 212 (N.D. Ill. 1983), *aff'd*, No. 85-1050 (slip opinion) (7th Cir. July 1, 1985), *cert. denied*, No. 85-575 (November 18, 1985); *Beitzell v. Jeffrey*, 643 F.2d 840 (1st Cir. 1981). These decisions follow the reasoning of this Court in *Roth, supra*, 408 U.S. at 573, 575, that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." It logically follows, that petitioners were not deprived of a liberty interest "simply" because they were not promoted when they are "free as before to seek" other employment opportunities, and more importantly, to continue in the occupation of policeman.

The court of appeals stated that "*DiIulio* stands alone" in finding a liberty interest in promotions. *Bigby, supra*, 766 F.2d at 1059. The court found that the error in *DiIulio* was that the decision did not "distinguish between exclusion from an entire occupation and exclusion from a particular position or rank in the occupation . . . ." *Id.* The distinction had to be made for the right to engage in an occupation must not be confused with the right to a particular job. *Lawson v. Sheriff of Tippecanoe County, Inc.*, 725 F.2d 1136, 1138 (7th Cir. 1984). In light of the settled law, the court of appeals did not commit error in reversing *DiIulio*, and a writ of *certiorari* should not be granted.

Petitioners assert not a right to engage in a given occupation, but rather a right to a particular job in the Chicago police force. These assertions do not establish a liberty interest owed protection by the Fourteenth Amendment.

CONCLUSION

For these reasons, the Petition for writ of *certiorari* should be denied.

Respectfully submitted,

JAMES D. MONTGOMERY,*
Corporation Counsel of the
City of Chicago,
610 City Hall,
Chicago, Illinois 60602,
(312) 744-7764,
Attorney for Respondents.

MARY K. ROCHFORD,
Chief Assistant Corporation Counsel,
Of Counsel.

December 2, 1985

* Counsel of Record.